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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FIA CARD SERVICES, N.A.,
Successor in interest to MBNA CORPORATION,

Petitioner,

v.

LINDA S. PARKS, Trustee,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Tenth Circuit, contrary to Supreme Court precedent, and in conflict with the Fifth Circuit, found that:

Is a direct bank to bank transfer of funds a preference within the meaning of 11 U.S.C. § 547?

CORPORATE DISCLOSURE

Petitioner FIA Card Services, N.A. was formerly known as Bank of America, N.A. Bank of America, N.A. had merged with MBNA America Bank, N.A. FIA Card Services, N.A. is a wholly owned subsidiary of Bank of America Corporation.

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FIA Card Services, N.A. respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, dated December 30, 2008, is officially reported at 550 F.3d 1251, and is reproduced at App. A, 1a-8a.

The Memorandum Opinion and Order of the United States District Court for the District of Kansas, dated February 26, 2008, is reported at and is reproduced at App. B, 9a-27a.

The Memorandum Opinion and Order of the United States Bankruptcy Court for the District of Kansas dated July 23, 2007, is reported at and is reproduced at App. C, 27a-40a.

JURISDICTION

The Order of the United States Court of Appeals for the Tenth Circuit denying Petitioner's timely petition for rehearing was entered on January 27, 2009.

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Procedural History

On October 13, 2005, the Debtors filed for relief under Chapter 7 of title 11 of the United States Code in the United States Bankruptcy Court for the District of Kansas. On March 31, 2006 the trustee commenced an adversary proceeding to recover the alleged preferential transfer.

On July 23, 2007 the United States Bankruptcy Court entered Judgment in favor of FIA Card Services, N.A. and against the trustee.

On July 31, 2007 the trustee filed a Notice of Appeal to the United States District Court for the District of Kansas.

On February 28, 2008 the United States District Court entered Judgment in favor of FIA Card Services, N.A. and against the trustee.

On March 20, 2008 the trustee filed a Notice of Appeal to the United States Court of Appeals for the Tenth Circuit.

The United States Court of Appeals for the Tenth Circuit rendered its decision on December 30, 2008 and denied the Petition for Rehearing on January 27, 2009.

B. Statement of Facts

The Debtors had two credit card accounts with MBNA America Bank, N.A. and two credit card accounts with Capital One. On July 27, 2005 the Debtors directed Capital One to pay MBNA America Bank, N.A. $ 17,000.00 to be applied to MBNA America Bank, N.A. account xxxx-6264 through a balance transfer from the Capital One Platinum MasterCard account. On the same day the Debtors directed Capital One to pay MBNA America Bank, N.A. the sum of $ 21,000.00 to be applied to MBNA America Bank, N.A. account xxxx-7781 through a balance transfer from the Capital One Platinum Visa account.

REASONS FOR GRANTING THE PETITION

1. **The Tenth Circuit adopted a standard which is in conflict with the existing precedent of the Supreme Court of the United States and Circuit Court should not be permitted to do this.**

2. **The decision of the Tenth Circuit has created a conflict with the Fifth Circuit as to whether or not a direct bank to bank transfer of funds is a transfer of an interest of the debtor in property.**

3. **This case provides a suitable opportunity for the Court to clarify whether a direct bank to bank transfer of funds is a transfer of an interest of the debtor in property.**

The writ should be granted to both resolve the conflict in the circuits and to reinforce this Court's determination as to what is necessary to establish a preferential transfer.

> The Tenth Circuit adopted a standard which is in conflict with the existing precedent of the Supreme Court of the United States and Circuit Court should not be permitted to do this.

The Supreme Court of the United States has stated that "property of the debtor subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of the bankruptcy proceeding. *Begier v. IRS*, 496 U.S. 53, 110 S. Ct. 2258 (1990). The decision of the United States Court of Appeals conflicts with this holding because it developed a different, and conflicting, standard for determining when a preferential transfer occurred.

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriguez De Quijas et al. v. Shearson/American Express, 490 U.S. 477, at pp. 484-486, 109 S. Ct. 1917, 104 L. Ed. 2d 526, 57 U.S.L.W. 4539 (1989).

Property that is directly transferred from one bank to another bank could never have been part of the estate and there is no evidence in the record that the funds would have been part of the estate had the funds not been transferred. However, the Tenth Circuit disregard *Begier v IRS, supra,* when it reached its decision.

The United States Court of Appeals for the Tenth Circuit looked to Kansas state law for the proposition that the ownership of an item carries with it the right to use, or to control the use of, that item. *J.A.Tobin Construction Co. v Holtzman*, 207 Kan. 525, 485 P.2d 1276, at p. 1281 (1971).

This decision has created two very serious legal problems.

First, the Tenth Circuit has created a different legal standard that the one created by this Court in *Begier v. IRS, supra.* As clearly set forth in this case the Tenth Circuit decision found that the Debtors had "control" over the borrowed money but if the money has not been transferred, under the *Begier v. IRS, supra,* standard, the money would not have been property of the Debtors but would have remained the property of Capital One.

The second problem is that Kansas Supreme Court was not considering money that is being loaned by a bank to a debtor. The decision of the Kansas Supreme Court is consistent with Capital One controlling the use of the money which would make Capital One the owner of the money and not the Debtors.

> The decision of the Tenth Circuit has created a conflict with the Fifth Circuit as to whether or not a direct bank to bank transfer of funds is a transfer of an interest of the debtor in property.

The United States Court of Appeals for the Fifth Judicial Circuit stated in *Coral Petroleum Inc., v Baque Parisas-London*, 797 F.2d 1351, at p. 1356 (5th Cir. 1986):

> If all that occurs in a 'transfer' is the substitution of one creditor for another, no preference is created because a debtor has not transferred property of his estate; he still owes the same sum to a creditor, only the identity of the creditor has changed.

The decision of the Tenth Circuit conflicts with the decision of the Fifth Circuit in that the Tenth Circuit found that even if a transfer is a substitution of one creditor for another, Capital One for MBNA America Bank, N.A., a preference has been created.

> This case provides a suitable opportunity for the Court to clarify whether a direct bank to bank transfer of funds is a transfer of an interest of the debtor in property.

There now exists at least two different standards to determine whether or not a direct bank to bank transfer is a preferential transfer within the meaning of 11 U.S.C. § 547. It appears for some reason that the Tenth Circuit did not even consider whether the funds that were transferred from Capital One to MBNA America Bank,

N.A. would have been property of the bankruptcy estate had they not been transferred.

There should only be one national standard for this issue and this case presents this Court with the opportunity to establish that standard and resolve the conflict.

CONCLUSION

For the foregoing reasons, petitioner asks that this Court grant their petition for a writ of certiorari and reverse the judgment of the United States Court of Appeals for the Tenth Circuit, reinstating the order granting summary judgment to the petitioner.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED DECEMBER 30, 2008

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 08-3080

In re: BRYAN K. MARSHALL
and JULIE M. MARSHALL,

Debtors.

LINDA S. PARKS, Trustee,

Plaintiff - Appellant,

v.

FIA CARD SERVICES, N.A., Successor in interest to MBNA CORPORATION,

Defendant - Appellee.

Appeal from the United StatesDistrict Court
for the District of Kansas
(D.C. No. 07-CV-01222-WEB)

Before **TACHA, BRISCOE**, and **O'BRIEN**, Circuit Judges.

O'BRIEN, Circuit Judge.

During the ninety-day period prior to filing of their Chapter 7 bankruptcy petition, Bryan and Julie Marshall (Debtors) used their Capital One credit card accounts to make payments on their MBNA credit card accounts. Linda Parks, the bankruptcy Trustee, filed an adversary complaint against MBNA (now FIA Card Services) seeking to avoid the payments as preferential transfers under 11 U.S.C. § 547(b). The bankruptcy court concluded the payments were not preferential transfers; the district court agreed. We reverse.[1]

I. BACKGROUND

The parties stipulated to the following facts. Debtors had two credit card accounts with MBNA: 6264 and 7781. They also had two credit card accounts with Capital One—a Platinum MasterCard account with a $30,000 line of credit and a Platinum Visa account with a $25,000 line of credit. On July 27, 2005, Debtors directed Capital One to pay MBNA $17,000 on the 6264 MBNA account through a balance transfer from their Capital One Platinum MasterCard account. On the same day, they directed Capital One to pay MBNA $21,000 on the 7781 MBNA account through a balance transfer from their Capital One Platinum Visa account.

On October 13, 2005, Debtors filed a bankruptcy petition under Chapter 7 of the Bankruptcy Code. Parks

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1. Our jurisdiction derives from 28 U.S.C. § 158(d).

was appointed Trustee. Because Debtors' payments to MBNA were made within ninety days of the filing of the bankruptcy petition (referred to as the preference period), Parks filed an adversary complaint against MBNA seeking to avoid these payments as preferential transfers under 11 U.S.C. § 547(b). Shortly thereafter, FIA Card Services (FIA), MBNA's successor-in-interest, was substituted as the defendant.

The bankruptcy court determined Debtors' payments to MBNA were not preferential transfers because they did not constitute transfers of an interest of Debtors in property as required by 11 U.S.C. § 547(b):

> [T]he funds paid to . . . MBNA were assets of Capit[a]l One in which the Debtors did not have an interest for purposes of § 547. Debtors merely exercised an offer to transfer credit card balances; this offer, if not exercised as of the date of filing, would have added no value to the estate. The transfer was a mere substitution of creditors which had no impact on either the property of the estate or the value of the claims asserted against the estate.

(R.App. at 80-81.) Parks appealed to the district court.

The district court affirmed the bankruptcy court's decision but analyzed the case under the earmarking doctrine which, in its broadest terms, exempts a debtor's use of borrowed funds from the Trustee's avoidance powers when those funds are lent for the purpose of

paying a specific debt. In doing so, it looked to the amount of control Debtors exercised over the payments to MBNA and whether the transfer of those payments diminished the bankruptcy estate. It thought Debtors lacked the requisite control over the payments for them to constitute interests of Debtors in property:

> It is undisputed that the debtors never possessed a check or proceeds of a loan. Capital One was under no obligation to cooperate with the debtors' request. The debtor[s] could not compel Capital One to make a payment. Nonetheless, Capital One chose to make a payment directly and specifically to MBNA on the debtors' behalf and essentially substituted itself as the debtors' creditor for the MBNA debt under the terms agreed [to] through the balance transfer agreement. The Court finds this to be a bank to bank transfer resulting in a substitution of the debtors' creditors.

(*Id.* at 156-57 (footnote omitted).) The district court also concluded that because there was never a transfer of assets, only credit, the bankruptcy estate was not diminished.

Appendix A

II. DISCUSSION

Addressing preferences, § 547(b) of the Bankruptcy Code states in relevant part:

> [T]he trustee may avoid any transfer of an interest of the debtor in property—
>
> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made—(A) on or within 90 days before the date of the filing of the petition; . . . and
>
> (5) that enables such creditor to receive more than such creditor would receive if—
>
> > (A) the case were a case under chapter 7 of this title;
> >
> > (B) the transfer had not been made; and
> >
> > (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b). The purpose of the statute is two-fold: (1) "to secure an equal distribution of assets among creditors of like class" and (2) "to discourage actions by creditors that might prematurely compel the filing of a [bankruptcy] petition." *Gillman v. Scientific Research Prods., Inc., of Del. (In re Mama D'Angelo, Inc.)*, 55 F.3d 552, 554 (10th Cir.1995). The Trustee bears the burden of proving the avoidability of a transfer under § 547(b). *See* 11 U.S.C. § 547(g). If the Trustee succeeds, 11 U.S.C. § 550(a) allows her to recover the transferred property for the benefit of the estate.

Only the threshold requirement of 11 U.S.C. § 574(b) is at issue here, *i.e.*, whether the payments made to Debtors' MBNA credit card accounts from their Capital One credit card accounts constitute transfers of "an interest of the debtor in property." This is a legal issue we review de novo. *See Morris v. Hicks (In re Hicks)*, 491 F.3d 1136, 1139 (10th Cir.2007).

The Bankruptcy Code does not define "an interest of the debtor in property." However, in *Begier v. IRS*, the Supreme Court said:

> Because the purpose of the avoidance provision is to preserve the property includable within the bankruptcy estate—the property available for distribution to creditors—"property of the debtor" subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been

> transferred before the commencement of bankruptcy proceedings. For guidance, then, we must turn to § 541, which delineates the scope of "property of the estate" and serves as the postpetition analog to § 547(b)'s "property of the debtor."

496 U.S. 53, 58-59, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990).[2] Section 541(a)(1) provides that the property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the [bankruptcy] case" wherever located and by whomever held. "[T]he scope of [§] 541 is broad and should be generously construed [;] . . . an interest may be property of the estate even if it is novel or contingent." *Baer v. Jones (In re Montgomery)*, 224 F.3d 1193, 1194 (10th Cir.2000) (quotations omitted).

"For purposes of most bankruptcy proceedings, property interests are created and defined by state law. Once that state law determination is made, however, we must still look to federal bankruptcy law to resolve the extent to which that interest is property of the estate." *Bailey v. Big Sky Motors, Ltd. (In re Ogden)*, 314 F.3d

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2. In *Begier*, the Court analyzed the meaning of the phrase "property of the debtor" which was the language used in the pre-1984 version of 11 U.S.C. § 547(b). 496 U.S. at 59 n. 3, 110 S.Ct. 2258. Nevertheless, because the amendment of that phrase to the current phrase ("interest of the debtor in property") was only a "clarifying change," the Court said both phrases were coextensive with property of the estate as defined in 11 U.S.C. § 541(a)(1). *Id.* (quotations omitted).

1190, 1197 (10th Cir.2002) (citations and quotations omitted). We have uncovered no Kansas authority specifically addressing the issue presented here but, in general, the right to use an item or to control its use is a property interest. *See J.A. Tobin Constr. Co. v. Holtzman*, 207 Kan. 525, 485 P.2d 1276, 1281 (Kan.1971) ("The ownership of an item of property carries with it the right to use, or to control the use of, that item of property. Therefore, where one has been wrongfully deprived of the use of an item of property there has been a loss of one of the valuable rights or interests in property—the right to use the property.").[3]

Courts have used this dominion/control test to determine whether a transfer of property was a transfer of "an interest of the debtor in property." *See, e.g., McLemore v. Third Nat'l Bank in Nashville (In re Montgomery)*, 983 F.2d 1389, 1395 (6th Cir.1993); *In re Smith*, 966 F.2d 1527, 1531 (7th Cir.1992). Under this test, a transfer of property will be a transfer of "an interest of the debtor in property" if the debtor exercised dominion or control over the transferred property. *See id.*

Other courts have applied a diminution of the estate test. *See, e.g., Southmark Corp. v. Grosz (In re Southmark Corp.)*, 49 F.3d 1111, 1116-17 (5th Cir.1995); *Hansen v. MacDonald Meat Co. (In re Kemp Pac.*

3. We are applying Kansas law because it is the forum state. Since the credit card agreement between Capital One and Debtors is not included in the record, we are unaware of any choice of law provision in the agreement.

Fisheries, Inc.), 16 F.3d 313, 316 (9th Cir.1994); *Manchester v. First Bank & Trust Co. (In re Moses)*, 256 B.R. 641, 645 (B.A.P. 10th Cir.2000). Under this analysis, a debtor's transfer of property constitutes a transfer of "an interest of the debtor in property" if it deprives the bankruptcy estate of resources which would otherwise have been used to satisfy the claims of creditors. *See id.* "[I]f the debtor transfers property that would not have been available for distribution to his creditors in a bankruptcy proceeding, the policy behind the avoidance power is not implicated." *Begier*, 496 U.S. at 58, 110 S.Ct. 2258.

As both the district court and bankruptcy court acknowledged, their conclusion that the credit card payments in this case were not transfers of "an interest of [Debtors] in property" represents the minority view. The majority of courts to address the issue have gone the other way. *See, e.g., Meoli v. MBNA Am. Bank, N.A. (In re Wells)*, 382 B.R. 355 (B.A.P. 6th Cir.2008); *Parks v. Boeing Wichita Credit Union (In re Fox)*, 382 B.R. 800 (Bankr.D.Kan.2008); *Mukamal v. Bank of Am. (In re Egidi)*, 386 B.R. 884 (Bankr.S.D.Fla.2008); *Lewis v. Providian Bancorp (In re Getman)*, 218 B.R. 490 (Bankr.W.D.Mo.1998); *Yoppolo v. Greenwood Trust (In re Spitler)*, 213 B.R. 995 (Bankr.N.D.Ohio 1997); *but see Loveridge v. Ark of Little Cottonwood, Inc. (In re Perry)*, 343 B.R. 685, 688 (Bankr.D.Utah 2005) (setting forth minority view). These courts reason that the debtor, even if never in actual possession of the loaned proceeds, exercises dominion or control over them as evidenced by an ability to direct their distribution.

See, e.g., In re Wells, 382 B.R. at 361; *In re Egidi,* 386 B.R. at 894; *In re Getman,* 218 B.R. at 493-94; *In re Spitler,* 213 B.R. at 998-99. They also conclude such transactions deplete the bankruptcy estate—when a debtor converts an offer of credit into loan proceeds and uses those proceeds to pay another creditor, the debtor deprives the bankruptcy estate of those proceeds. *See, e.g., In re Wells,* 382 B.R. at 360; *In re Spitler,* 213 B.R. at 999.

We agree with the majority view. Technology masks the processes involved here. Separating them into constituent elements reveals a sequence of events, not just one: Debtors drew on their Capital One line of credit; that draw converted available credit into a loan; Debtors directed Capital One to use the loan proceeds to pay MBNA; and Capital One complied. It is essentially the same as if Debtors had drawn on their Capital One line of credit, deposited the proceeds into an account within their control, and then wrote a check to MBNA. The latter is clearly a preference. *In re Ogden,* 314 F.3d at 1199; *see also Flatau v. Walman Optical Co. (In re Werner),* 365 B.R. 283, 287 (Bankr.M.D.Ga.2007). That case involved constructive[4] rather than physical

4. At bottom constructive possession is a convenient way to describe a right or ability to control personal property or an interest in it.

> Constructive possession of personal property by its owner exists where the owner has [i]ntentionally given the [a]ctual possession—namely, the direct

(Cont'd)

possession and took place electronically rather than mechanically (through deposit slips and checks) is of no moment. In both scenarios, debtors obtained an interest in the loan proceeds even if the interest was only fleeting. An ability to control, made manifest, must equate to physical control. *See In re Spitler*, 213 B.R. at 999 (stating it is "the substance of the transfer, not its form, [which] is dispositive" as to whether a debtor has the ability to control the distribution of credit proceeds) (quotations omitted). The Debtors' exercise of their ability to control the disposition of the loan proceeds is the essence of this case.

(Cont'd)

> physical control—of the property to another for the purpose of having him do some act [f]or the owner to or with the property; that is to say, constructive possession exists wholly in contemplation of law without possession in fact. If the controlling reason or primary purpose for which the surrender of possession is made belongs to the owner, he retains constructive possession. Where the owner retains constructive possession, the party to whom bare physical control of the property has been entrusted for the owner's purpose does not have possession but only custody.

Jacobson v. Aetna Cas. & Sur. Co., 233 Minn. 383, 46 N.W.2d 868, 871 (Minn.1951); *see also* 63C AM. JUR. 2D *Property* § 30 ("One may have possession of [personal property], even in the absence of actual personal custody, if the [property] is under his or her control and in a place where it must have been put by his act or in his or her behalf, or where the [property] is within his or her power in such a sense that he or she can and does command its use.").

Appendix A

Contrary to the district court's conclusion, there is no evidence Capital One could have stopped the payments to MBNA once it honored Debtors' draw. The payments were a debtor's discretionary use of borrowed funds to pay another debt. Such transactions are generally considered preferential transfers. *See In re Ogden*, 314 F.3d at 1199. The only exception to this rule is the earmarking doctrine, which the district court incorrectly applied.

Earmarking, even if extended beyond the codebtor context,[5] only applies when the lender requires the funds

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5. The judicially-created earmarking doctrine was originally limited to codebtor cases, *i.e.*, cases in which the lender who provides the funds to the debtor to pay off the creditor was also obligated to the creditor either as a guarantor or surety. *Manchester v. First Bank & Trust Co. (In re Moses)*, 256 B.R. 641, 645 (B.A.P. 10th Cir.2000). In such cases, there were three rationales for why such payments were not voidable by the Trustee: (1) the lender's payment to the creditor did not constitute a transfer of the debtor's property; (2) no diminution of the debtor's estate occurred since the debtor's new obligation to the lender was equal to the amount the debtor had owed to the creditor; and (3) to prevent unfairness to the lender—if its payment to the creditor was avoided and the money was recaptured for the bankruptcy estate, the lender, as guarantor, would forfeit that money but remain obligated to the creditor. *Id.* at 646. Eventually this doctrine was extended to cases in which the lender was not a guarantor or surety but rather provided funds to the debtor for the purpose of paying a specific indebtedness. *Id.*

In *In re Moses*, the Tenth Circuit Bankruptcy Appellate Panel concluded the earmarking doctrine should not have been (Cont'd)

be used to pay a specific debt. *See In re Dilworth*, 383 B.R. 415, 418 (Bankr.N.D.Ohio 2007); *In re Fox*, 382 B.R. at 803; *In re Getman*, 218 B.R. at 493-94. Here, Capital One placed no conditions on Debtors' use of the funds, it only honored their instructions. The earmarking doctrine is inapplicable.

And Debtors' exercise of control of the loan proceeds also distinguishes this case from a bank-to-bank transfer of consumer debt, in which one bank simply agrees to purchase consumer debt from another bank. A debtor is not directly involved, let alone in control—a notice comes to the debtor redirecting required payments to the acquiring institution. Moreover, there was no agreement between Capital One and MBNA for the purchase of Debtors' paper.

We also consider whether Debtors' transfer of the Capital One loan proceeds to MBNA diminished the bankruptcy estate. It did. The net value of the estate did not change because the Capital One infusion of loan proceeds was totally offset by additional debt to Capital One. But that is not the relevant test. We must ask whether the loan proceeds "would have been part of the estate had [they] not been transferred before the commencement of bankruptcy proceedings." *Begier*, 496 U.S. at 58, 110 S.Ct. 2258. The Capital One loan

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(Cont'd)

extended beyond the codebtor context. *Id.* at 651. We need not resolve the issue here because even if so extended, it does not apply in this case.

proceeds were an asset of the estate for at least an instant before they were preferentially transferred to MBNA.[6] The preferential transfer look back is not time sensitive—the issue is whether any asset, regardless of how fleeting its presence in the bankrupt's estate during the relevant period of time, should be ratably apportioned among qualified creditors or permitted to benefit only a preferred creditor. The answer is as clear as the statute itself—all preferential transfers of estate assets during the ninety-day look back are subject to recapture.

In reaching the opposite conclusion, the district court and bankruptcy court mistakenly characterized the transferred property as untapped credit. In their view untapped credit cannot be used to satisfy creditors and, thus, no diminution of the estate occurred. *See In re Wells*, 382 B.R. at 360-62. But this case does not involve untapped credit. A transfer of loan proceeds (an asset) diminishes the bankrupt's estate.

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6. The moment Capital One honored Debtors' draw on their line of credit those proceeds (the newly loaned funds) became an asset of Debtors' estate. A short time (perhaps only a nanosecond) later the assets were dissipated by the transfers to MBNA. The loan proceeds, like all preferential transfers, were not in the hands of Debtors when the bankruptcy petition was filed. But because of the preferential transfer statute, we must determine whether the proceeds were part of Debtors' estate at *any* time during the ninety-day look back. They were part of the bankruptcy estate immediately before being transferred to MBNA. The additional debt which accompanied the Capital One transactions is not relevant to our preference analysis, which concerns only assets.

Treating the payments to MBNA as avoidable preferential transfers furthers § 547(b)'s policy of equality of distribution between similarly situated creditors. Recapture allows all qualifying creditors, including Capital One and FIA, to ratably share in a $38,000 estate asset. *Id.* at 361; *see also In re Fox*, 382 B.R. at 804.

We **REVERSE** and **REMAND** to the district court for further proceedings consistent with this opinion.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DATED FEBRUARY 26, 2008

UNITED STATES DISTRICT COURT
FOR DISTRICT OF KANSAS

U.S. Dist. Ct. No. 07-1222-WEB
Case No. 05-18216

Chapter 7

Adv. No. 06-5181

IN RE:

BRYAN K. MARSHALL
JULIE M. MARSHALL,

Debtors.

LINDA S. PARKS, TRUSTEE,

Plaintiff/Appellant,

vs.

FIA CARD SERVICES, N.A., successor in interest to MBNA CORPORATION

Defendant/Appellee.

Appendix B

MEMORANDUM AND ORDER

This case comes before the court upon an appeal from a Bankruptcy Court order wherein that court denied a trustee's complaint to recover upon a claimed preferential transfer. (Doc. 1, Ex. 3).

I. BACKGROUND FACTS

This appeal arises from a final order and judgment wherein a bankruptcy court designated transfers of a debtor made within the 90 day avoidable period provided under 11 U.S.C. § 547(b) to fail to qualify as a "transfer of interest in property." Consequently, the disputed transfers were excluded from the bankruptcy estate. The Appellant contends that the disputed transfers are preferential, while the Appellee argues the transfer cannot qualify as a preferential transfer.

The facts surrounding the case are as follows. On October 13, 2005, Bryan K. Marshall and Julie M. Marshall ("Debtors") filed a Chapter 7 bankruptcy petition. Linda S. Parks ("Trustee" and "Appellant") was appointed to serve as Trustee of the Debtors' bankruptcy estate. The parties consented, in lieu of a trial, to stipulate to the facts and brief this matter to Bankruptcy court. The parties consented to the entry of a final order by the Court based on these stipulations and briefs in this matter. Based upon the stipulations, this Court largely repeats the "Findings of Fact" concluded by the Bankruptcy Court in its Memorandum and Order. (Doc. 1, Ex. 3, pg.3-4).

Appendix B

Debtors had two credit card accounts with MBNA, one account ending in 6264 and one account ending in 7781. On July 24, 2005 the balance on the MBNA account ending in 6264 was $17,009.55, and the balance on the MBNA account ending in 7781 was $22,449.15. Debtors also had two Capital One Platinum Mastercard Accounts, with $30,000 available credit on the account ending in 0125 and $25,000 available credit on the account ending in 5090.

On July 27, 2005, in accord with Debtors' directions, Capital One paid MBNA the sum of $17,000 on the MBNA account ending in 6264 and the sum of $21,000 on the MBNA account ending in 7781. Debtors' credit limit on the MBNA account ending in 6264 was increased by the amount of the payment. The amounts due by Debtors to Capital One Platinum MasterCard Accounts were increased by the amounts of the payments to MBNA, with the transfer of $17,000 being charged to the Capital account ending in 0125 and $21,000 being charged to the account ending in 5090. No funds were disbursed to the Debtors. Debtors' total credit card debt was not increased by the transactions. In the past, Debtors had made sporadic, monthly payments to MBNA, in amounts significantly less than the full account balances. The July 27, 2005 payments were made within the preference period, while the Debtors were insolvent.

On July 23, 2007, the Bankruptcy Court for the District of Kansas issued a Memorandum and Order which denied the Trustee's complaint to recover as a

preferential transfer Capital One's payments to the defendant FIA Card Services.[1] On August 1, 2007, the Trustee/Appellant filed an Appeal of the Bankruptcy Court's order, wherein the Trustee moves this Court to deem the transfer a preferential transfer and return the proceeds of the transfer to the bankruptcy estate. (Doc. 1). FIA Card Services now defends the bankruptcy court's order and serves as Defendant-Appellee in this appeal.

II. STANDARD OF REVIEW

For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); see Fed. R. Bankr.P. 8013; *Fowler Bros. V. Young* (*In re Young*), 91 F.3d 1367, 1370 (10th Cir.1996). De novo review requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision. *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991).

The appropriate standard of appellate review in this matter is a de novo review. The facts in this matter have been stipulated to and are not in dispute; therefore, it is only the conclusions of law that are at issue in this

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1. FIA Card Services is the successor in interest to MBNA Corporation.

matter and are subject to de novo review. *Travelers Insurance Co. v. American Ag Credit Corp.* (*In re Blehm Land & Cattle Co.*), 859 F.2d 137 (10th Cir.1988).

III. APPLICABLE LAW

A. Statutes and Applicable Cases

Under Title 11 U.S.C. § 547(b),[2] "a transfer is avoidable if it: (1) is of an interest of the debtor in property; (2) is for the benefit of a creditor; (3) is made for or on account of antecedent debt owed by the debtor before the transfer was made; (4) is made while the debtor was insolvent; (5) is made on or within ninety days before the date the bankruptcy petition was filed; and (6) allows a creditor to receive more than the creditor would otherwise be entitled to receive from the bankruptcy estate." *Bailey v. Big Sky Motors, Ltd.* (*In re Ogden*), 314 F.3d 1190, 1196 (10th Cir.2002).

The burden of proving each of these elements rests on the trustee." *Id.* (quoting *Sender v. Johnson* (*In re Hedged Investments Assocs., Inc.*), 84 F.3d 1267, 1270 (10th Cir.1996)). In this appeal, the dispute concerns the threshold issue of whether the credit card payments by Capital One constituted a transfer of "an interest of the debtor in property." (Doc.2, Ex. 5(Stipulations)) (Doc. 4 pg. 6-7) (Doc. 5, p.vii).

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2. All statutory sections will refer to Title 11 unless otherwise specified.

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"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *In re Kunz*, 489 F.3d 1072, 1077 (10th Cir.2007) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Id.* (*quoting Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985).

The Bankruptcy Code does not define "an interest of the debtor in property." For guidance in defining this term the Supreme Court direct courts to refer to Section 541(a)(1)'s definition of "property of the estate." *Begier v. U.S.*, 496 U.S. 53, 60 (1990). § 541(a)(1) defines the property of the estate to consist of "all legal or equitable interests of the debtor in property as of the commencement of the case." Consequently, " 'property of the debtor' subject to [§ 547(b)] is best understood as that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings." *Begier*, 496 U.S. at 58. "[T]he fundamental inquiry under § 547(b) will be whether the Debtor had a legal or equitable interest in the property [transferred] such that the transfer at issue diminished or depleted the Debtor's estate." *Manchester v. First Bank & Trust* (*In re Moses*), 256 B.R. 641, 645 (10th Cir. BAP2000) (*quoting Bailey v. Hazen* (*In re Ogden*), 243 B.R. 104, 113 (10th Cir. BAP2000).

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In preference litigation, the form of the transaction must satisfy the statutory elements, and the "debtor's intent or motive is not material." Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 547.03, 547-14-15 (15th ed. rev.2007).

B. Earmarking Doctrine Exception

1. General Application of the Doctrine

"Earmarking" is a judicially-created doctrine that originally arose under the Bankruptcy Act in co-debtor cases where the new creditor, who was obligated on an existing debt as a guarantor or surety, provided the debtor with funds to pay the old creditor. See *In re Moses*, 256 B.R. at 645-46.[3] The earmarking doctrine was eventually extended "to situations where the new creditor is not a guarantor but merely loans funds to

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3. *See, e.g., National Bank v. National Herkimer County Bank*, 225 U.S. 178, 32 S.Ct. 633, 56 L.Ed. 1042 (1912); *Smyth v. Kaufman* (*In re J.B. Koplik & Co.*), 114 F.2d 40, 42 (2d Cir.1940); *First Nat'l Bank v. Phalen*, 62 F.2d 21 (7th Cir.1932); *see also Adams v. 646 Anderson* (*In re Superior Stamp & Coin Co.*), 223 F.3d 1004, 1008 (9th Cir.2000) (discussing history of earmarking doctrine); *McCuskey v. Nat'l Bank* (*In re Bohlen Enters., Ltd.*), 859 F.2d 561, 565-66 (8th Cir.1988) (same); *Brown v. First Nat'l Bank*, 748 F.2d 490, 491 (8th Cir.1984) (applying doctrine in co-debtor situation) (citing cases); *Gray v. Travelers Ins. Co.* (*In re Neponset River Paper Co.*), 231 B.R. 829, 834 (1 st Cir. BAP 1999) (recognizing origins of earmarking doctrine); *Glinka v. Bank of Vt.* (*In re Kelton Motors, Inc.*), 153 B.R. 417, 424-26 (Bankr.D.Vt.1993) (same); *Collier*, ¶ 547.03[2] at 547-24-29 (15th ed. rev.2007).

the debtor for the purpose of enabling the debtor to pay the old creditor." *In re Moses*, 256 B.R. at 646 (quoting *McCuskey v. Nat'l Bank* (*In re Bohlen Enters., Ltd.*), 859 F.2d 561, 566 (8th Cir.1988)); see *In re Kertz*, 347 B.R. 418 (Bankr.D.Colo.2006).

"Under the 'earmarking doctrine,' funds provided to a debtor for the purpose of paying a specific indebtedness may not be recoverable as a preference from the creditor to which they are paid, on the premise that the property 'transferred' in such a situation was never property of the debtor and so the transfer did not disadvantage others creditors. One creditor has been substituted for another thus, when the new funds are provided by the new creditor to or for the benefit of the debtor for the purpose of paying the obligation owed to the old creditor, the funds are said to be 'earmarked' and the payment is held not to be a voidable preference." Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 547.03[2], at 574-24 (15th ed. rev.2007).

Various courts have undertaken three lines of examination in determining if a transaction qualifies for the exception. A number of courts utilize the "intent" test, which requires: (1) the existence of an agreement between the new lender and the debtor that the new funds will be used to pay a specified antecedent debt, (2) performance of that agreement according to its terms and (3) the transaction viewed as a whole does not result in any diminution of the estate. See *In re Bohlen Enters., Ltd.*, 859 F.2d at 565, 566 (8th Cir.1988). Other courts examine an earmarking defense under the

"control test," where courts typically consider "whether the new creditor restricted the use of the funds, whether the debtor had physical control over the funds, and whether the debtor had the ability to direct to whom the funds should be paid." *In re Moses* 256 B.R. at 650. A third line of cases incorporate the self-explanatory "diminution of the estate" test, where the court simply looks at if the bankruptcy estate was diminished by the transfer. See *id.* at 650.

The 10th Circuit has not explicitly adopted any of the tests; nonetheless each analysis ultimately inspects the dominion and control the debtor exercised over the property and if the transaction resulted in a diminution of the debtor's estate. *Id.* at 645. The "control" analysis and the "diminution of the estate" analysis are closely tied. "Control" of the property will generally lead to a property interest, and consequently, in circumstances the debtor transfers such property interest a "diminution of the estate" results.[4]

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4. See *In re Hartley*, 825 F.2d 1067, 1070 (6th Cir.1987) (wherein court stated: "In the context of transfers by third parties, the diminution of estate doctrine asks whether the debtor controlled property to the extent that he owned it and thus the transfer diminished his estate."); see also *Matter of Smith*, 966 F.2d 1527, 1538-1539 (7th Cir.1992) (Flaum.J., dissenting) (citing in part *In re Hartley*, 825 F.2d at 1070) ("Concluding that a debtor's estate has not been diminished when a third party pays off a debt owed an old creditor is shorthand for 'the transferred funds were never the debtor's property because the debtor never had the power to allocate them to other creditors.' ").

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2. Application to the case at bar

The extension of the doctrine beyond just guarantors, where a third party creditor merely loans funds to the debtor for the purpose of enabling the debtor to pay the old creditor, has endured verbose criticism. See *In re Moses*, 256 BAP at 646-49.[5] Both parties in this case concede to the narrow application of the "earmarking doctrine" espoused in *In re Moses*, wherein the 10th Circuit BAP court concluded that the doctrine should apply only in cases involving co-debtors. *Id.* The parties indicate that since this case involves parties who were not co-debtors that the earmarking doctrine is inapplicable. (Doc. 6 p. 10-12).[6]

Nonetheless, the arguments put forth by both parties center upon the debtors "control" of the payments to MBNA and whether such payments "diminished" the debtors' estate. (Doc. 3, 5, 6). These arguments mirror those one would make in an earmarking analysis without explicitly asserting an "earmarking" exception. The Court has neither been presented with nor does it find controlling authority

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5. See e.g., *Bohlen*, 859 F.2d at 566 (in dictum, the Eighth Circuit questions application, although ultimately adopts the non-guarantor application in its analysis); *Neponset River*, 231 B.R. at 835 (First Circuit BAP refuses to extend doctrine beyond co-debtor situation).

6. Appellee's brief (Doc.5) makes no mention of earmarking. This Court feels the absence of its assertion is tantamount to conceding that it does not apply.

affirmatively support limiting the benefits of the earmarking doctrine solely to co-debtors or guarantors.

The court recognizes that "control" and "diminution of the estate" are also the analysis the Supreme Court directed in determining a § 547 property interest. See *Begier*, 496 U.S. at 58-59.[7] This Court determines that in accordance with the jurisdictional precedents it is subject to, it must consider the earmarking doctrine's application to the transfers at bar and that such application includes instances, such as here, where the new creditor is not a co-debtor or guarantor.[8]

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7. In *Begier* the court stated that to determine threshold issue of "transfer of a property interest" courts should look at the diminution of the estate and the ownership of legal title (i.e.control) of the interest. See also *Matter of Smith*, 966 F.2d at 1538 (Flaum J., dissenting) (stating that a conclusion that a debtor meets the earmarking doctrine or has not depleted the estate are "essentially" the same thing.)

8. Many circuits extend the earmarking exception beyond the guarantor context. See *Coral Petrol., Inc. v. Banque Paribas-London*, 797 F.2d 1351, 1356 (5th Cir.1986); *Mandross v. Peoples Banking Co.* (*In re Hartley*), 825 F.2d 1067, 1070 (6th Cir.1987); *In re Smith*, 966 F.2d 1527, 1533 (7th Cir.1992); *Buckley v. Jeld-Wen, Inc.* (*In re Interior Wood Prods. Co.*), 986 F.2d 228, 231 (8th Cir.1993); *Glinka v. Bank of Vt.* (*In re Kelton Motors, Inc.*), 97 F.3d 22, 28 (2d Cir.1996); *Adams v. Anderson* (*In re Superior Stamp & Coin Co.*), 223 F.3d 1004, 1008 (9th Cir.2000); see also 4 Norton Bankr.L. & Prac.3d § 66:16(2008) (noting the recent trend of adopting the expansive application of the doctrine). Most important to this Court, the 10th Circuit Court of Appeals

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Therefore, the court concludes that an earmarking analysis remains a necessary consideration in this case and finds no prejudice in applying the doctrine. The doctrine's adoption under these facts still require analyzing the debtor's "control" of the payment and the payments effect upon "diminishing the debtor's estate." These arguments of control and diminution have already been thoroughly argued in both parties' briefs.[9] Thus,

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recognized the broader earmarking doctrine, though initially not by the "earmarking" name in preferential transfer analysis. See *Inter-State National Bank of Kansas v. Luther*, 221 F.2d 382,393 (10th Cir.1955) (citing *Smyth v. Kaufman*, 114 F.2d 40 (2nd Cir.1940) and *Grubb v. General Contract Purchase Corp.*, 94 F.2d 70 (2nd Cir.1938) (*Grub* is an opinion written by Judge Learned Hand and is regarded as seminal case in which earmarking was applied beyond the guarantor context)). See also *In re Ogden*, 314 F.3d 1190, 1199 (10th Cir.2002)(the 10th Circuit, in a non-guarantor case, notes that the earmarking doctrine does not apply and cites two non-guarantor earmarking cases in support of the doctrine's failure under the facts in the case. The doctrines inapplicability is never explicitly or implicitly attributed to the new creditor not being a co-debtor.).

9. The court notes that BAP decisions are not binding upon District Courts. See *Bank of Maui v. Estate Analysis, Inc.*, 904 F.2d 470, 472 (9th Cir.1990) (stating: "[. . .] it must be conceded that BAP decisions cannot bind the district courts themselves. As article III courts, the district courts must always be free to decline to follow BAP decisions and to formulate their own rules within their jurisdiction."). Further, this Court views the *Moses* BAP court's conclusions on earmarking to be dicta, as the court already decided the case on separate grounds before concluding the doctrine only applies to co-debtor cases. *In re Moses*, at 256 BAP at 649.

these issues have been appropriately addressed by the parties.

IV. ARGUMENTS

The only issue before the court concerns whether the credit card payments made by Capital One to MBNA upon the direction of the debtors constituted a transfer of an "interest of the debtor in property" under § 547. (Doc.2, Ex. 5 (Stipulations)) (Doc. 4 pg. 6-7) (Doc. 5, p.vii). As discussed earlier, the debtors' interest in property is argued by the parties through their assertions of the debtors control of the payments and the consequence the payment sustained upon the debtors' bankruptcy estate.

A. Control of the Payment

The Appellees argue that the transfers were ostensibly bank to bank transfers wherein the debtors never possessed any control over the $38,000.00 involved in the payments. (Doc.5, p. 1-7). Appellees assert they merely authorized Capital One to transfer or replace their debt with MBNA and liken the transaction to the sale of debt which often occurs between lenders within the mortgage industry. (Doc. 5 at 3-5). Appellees maintain that the debtor's absence of possession of a check or proceeds establishes the debtors never holding a sufficient property interest in the payments. (Doc. 5).

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Appellees cite support for the transfers not imparting a sufficient property interest from the 5th Circuit Court of Appeals decision *Coral Petroleum Inc., v. Baque Parisas-London.* The court stated in the case:

> "If all that occurs in a 'transfer' is the substitution of one creditor for another, no preference is created because the debtor has not transferred property of his estate; he still owes the same sum to a creditor, only the identity of the creditor has changed. This type of transaction is referred to as 'earmarking,' (. . .)." (Doc. 5. p. 1). *Coral Petroleum Inc., v. Baque Parisas-London,* 797 F.2d 1351, 1356 (5th Cir.1986)

Conversely, the Appellant states in its Reply to Notice of Appeal that the transfers could not be bank to bank transfers or the sale of debt. (Doc. 6, p. 4-6). First, Appellants note the transfers were made at the direction of the debtors and not upon any unilateral action of Capital One. (*Id.* at 4). Further, they cite numerous cases wherein a balance transfer was made from one credit card issuer to another and the court found a preferential transfer existing due to the debtor's control in deciding which creditor is paid. (*Id.* p. 5-6).[10]

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10. The cases cited are as follows: *In the Matter of Joseph D. Smith,* 966 F.2d 1527 (7th Cir.1992) (through means of provisional credit bank granted debtor's checking account $125,000 for check that subsequently did not clear; Court deemed provisional credit to be a transfer of "debtor's interest

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in property"); *In re Bohlen Enterprises, Ltd.*, 859 F.2d 561 (8th Cir.1988)(debtor was given a loan for purpose of satisfying debt, but the checks written from loan account were used to pay down a separate, undisclosed debt to the old creditor; the case was ultimately decided on violation of the agreement); *Growe v. AT & T Univ. Card Servs.* (*In re Adams*), 240 B.R. 807, 811 (Bankr.D.Me.1999) (debtor sent blank checks from new creditor and court found the debtor ultimately determined whether and how to use the check and thus exhibited control; the court also found the transfer failed to show an agreement existed on how funds were to be allocated); *Lewis v. Providian Bancorp* (*In re Getman*), 218 B.R. 490 (Bankr.W.D.Mo.1998)(transfer from credit card company upon direction of debtor found to escape earmarking doctrine due to control deriving from debtor's ability to choose creditor); *Rafoool v. Citizens Equity Fed. Credit Union* (*In Re Hurt*), 202 B.R. 611 (Bankr.C.D.Ill.1996) (debtor's use of balance transfer check issued by the new creditor satisfied control in choosing which creditors to pay); *Reisz v. Napus Fed. Credit Union* (*In re Anderson*), 275 B.R. 264 (Bankr.W.D.Ken.2002). (Preferential transfer and dispositive control found where debtor used his newly acquired credit card to make payment of antecedent credit card debt); *Yoppolo v. Greenwood Trust Co.* (*In re Spitler*), 213 B.R. 995 (Bankr.N.D.Ohio 1997). (The debtor opened a new credit card account and instructed new creditor to pay the antecedent credit card debt.); *Werner v. Walman Optical company d/b/a X-Cel Contacts, Inc.* (*In re Werner*), 365 B.R. 283 (Bankr.M.d.Georg.2007). (Debtor used credit card to pay subsequent debt within 90 day period and was deemed preferential transfer); *Yoppolo v. MBNA American Bank* (*In re Dilworth*), 2007 Bankr.LEXIS 1376 (Bankr.N.D.Ohio, 2007) (Debtor used a balance transfer check to pay antecedent debt and court found a preferential transfer).

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B. Dimunition of the Estate

Secondly, the Appellees' brief argues that the transfer is not a preference because it did not result in a diminution of the estate. (Doc.5 pg. 2-7). It asserts that under no circumstances could the available credit have become a part of the bankruptcy estate and the credit exhausted could not be used to satisfy other creditors. (Doc. 5 p. 2-7). It argues that there is a significant difference between instances where a debtor has dominion and control over borrowed funds compared to only control of an existing credit within an account. (Doc. 5. p. 6).

The Appellees rest support for this distinction between credit and property from the case *In re Perry.* See *Loveridge v. The Ark of Little Cottonwood, Inc.* (*In re Perry*), 343 B.R. 685 (Bankr.D.Utah 2005) (Doc. 6, p. 6-7). In that case the court found that a balance transfer from a new credit card company resulted only in the transfer of "credit" and not "property. The court distinguished credit from property noting that "[a]t most a debtor's credit constitutes merely potential wealth" and that "[credit] on its own served no immediate benefit to the estate in bankruptcy." *Id. In re Perry,* 343 B.R. at 688. Accordingly, Appellees contend that the transfer of credit cannot and would not result in a diminution of the bankruptcy estates due to the transfer failing to be an asset or property. (Doc. 6).

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In contradiction, the Appellant argues, that the transaction resulted in funds that would have been available to the "pool of creditors" being diminished and therefore the estate was diminished. See *In re Moses* at 649. Appellant finds further support in the cases *In re Adams* and *In re Werner.* In *Werner,* where the court was determining if an estate was diminished and cited *Adams,* the court "concluded that the transfer did diminish the estate, not by increasing the debtor's liabilites, but 'negatively impact[ing] equal distribution of assets among [the debtor's] creditors.' " *In re Werner,* 365 B.R. 283,287 (Bkrptcy .M.D.Ga.2007) (citing *In re Adams* 240 B.R. at 812). *Growe v. AT & T Univ. Card Servs. (In re Adams),* 240 B.R. 807,812 (Bankr.D.Maine 1999).

This broader view of how to comprise a bankruptcy estate was also discussed *In the Matter of Joseph D. Smith,* wherein that court pondered that "[the estate] could also be interpreted more broadly to include diminishing the pool available to creditors at any time after the start of the 90-day preference period; then the debtor's pre-transfer property (that could be used to pay creditors) would simply be compared to its post-transfer property." *In the Matter of Joseph D. Smith,* 966 F.2d 1527,1536 (7th Cir.1992).[11] (Doc.6, p. 8-13).

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11. The court in the case ultimately found the estate was diminished using the more narrow analysis of "estate," due to the debtors "control" of the transferred property, but noting the arguable benefits of the broader "estate" view.

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IV. ANALYSIS AND CONCLUSION

"A 'transfer' of a part of the debtor-bankrupt's property is of course the first essential element of a preference, and payments to creditors of a bankrupt by third parties or to the bankrupt for the specific purpose on the part of such third party to satisfy the debt of a creditor does not constitute a transfer within the meaning of the preference statute." *Inter-State Nat. Bank of Kansas City v. Luther*, 221 F.2d 382, 393 (10th Cir.1955) (citing *Grubb v. General Contract Purchase Corp.*, 94 F.2d 70 (2nd Cir.1934)).

The stipulated facts indicate an agreement between Capital One and the debtor wherein the debtor authorized Capital One to make payments of $21,000.00 to the MBNA account ending in 7781 and $17,000.00 to the MBNA account ending in 6264 to pay antecedent debts owed by the debtor to MBNA.

Through an inspection of the debtors' "control" of the payments, and such payments' effect upon the estate, an appropriate determination of the debtors interest in the transfer and the protections provided by an earmarking exception, regardless of the doctrine/test used may be concluded. If the payments made on the debtors' behalf were sufficiently controlled by the debtor then the debtor would hold an interest in the property and could not qualify for the earmarking exception and such property's transfer would result in a diminution of the bankruptcy estate. On the contrary, if the debtor is found to not possess sufficient control of

the property the transfer of such property would not effect the bankruptcy estate.

A. Control of the payment

Capital One's payments made to MBNA did not exhibit the requisite control on behalf of the debtor to impart a property interest. It is undisputed that the debtors never possessed a check or proceeds of a loan. Capital One was under no obligation to cooperate with the debtors' request. The debtor could not compel Capital One to make a payment. Nonetheless, Capital One chose to make a payment directly and specifically to MBNA on the debtors' behalf and essentially substituted itself as the debtors' creditor for the MBNA debt under the terms agreed through the balance transfer agreement.[12] The Court finds this to be a bank to bank transfer resulting in a substitution of the debtors' creditors.

The Appellants contend that the debtors' ability to direct to whom Capital One made payments reached a level of control constituting a property interest. However, an ability to direct where the funds go does not in itself give rise to a property interest. See *In re Superior Stamp & Coin Co., Inc.*, 223 F.3d 1004,1010

12. Upon the Capital One's payments, after the direction of the debtor, an agreement is viewed to have been commenced and fullfilled, thus satisfying the first two requirements under the *McCusky* 3-part earmarking doctrine.

(9th Cir.2000).[13] As long as the funds were advanced for the purpose of paying a specific creditor, the debtor does not exercise "control" for the purposes of earmarking. *Id.* This Court believes this stance parallels the 10th Circuit's position. See *Inter-State National Bank of Kansas v. Luther*, 221 F.2d 382, 393 (10th Cir.1955).[14]

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13. The court in *Superior* stated: "However, it is irrelevant whether the debtor or the lender initiates discussions concerning a loan or proposes a particular creditor as the recipient of the funds, so long as the funds are advanced on the condition that they be used to pay that specific creditor. Where there is an agreement between a new lender and the debtor that the funds will be used to pay a specified antecedent debt, a debtor has not exercised control over the funds by "designat[ing] the creditor to whom the monies will be paid *independent of* a third party whose funds are being used . . . in payment of the debt. (quoting *In re Kemp*, 16 F.3d 313, 316)."

14. In *Inter-State National Bank of Kansas v. Luther*, the court stated in reference to "earmarking" protection: "the payment by the third party must be made with the specified intention on his part that it shall be used for the purpose of discharging the particular debt to the particular creditor. In other words, the third party, not the debtor, must choose the creditor and the debt to be paid. (citation omitted); see also *In re Ogden*, 314 F.3d 1190, 1199(10th Cir.2002) (the court, in a non-guarantor case, wrote that the earmarking doctrine did not apply to the facts in the case because the new creditor had not "designated the purpose" of the transfer.); cf. Margot Wikman-Bennett, *Earmarking in the Eighth Circuit*, 79 Iowa L.Rev. 965, 982 (May 1994) (discussing the *Luther* case's requirement that payment be with the explicit intention of a specific debt to qualify for the earmarking doctrine.)

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The funds here were specifically directed to a specific creditor. Only MBNA, or its successor, could retrieve the payment by Capital One. Again, the debtor did not possess proceeds from a loan, a check or any such discretionary funds.

In *Luther*, the 10th Circuit held that "earmarked" payments must be made by the third party with the "specified intention" that the funds be used for discharging a particular debt to a particular creditor. *Luther*, 221 F.2d at 393. Capital One made both payments to MBNA on specific accounts at the direction of the debtors. Capital One was exclusively in control of the payments and the payments were discharged from Capital One's own account, not the debtors. It is unquestioned that it was Capital One's specified intent that these payment were for a particular debt (MBNA accounts ending in 6264 and 7781) and for the particular creditor (MBNA).

Additionally, in the majority of the cases cited by the Appellant, the debtors clearly possessed greater control over the funds than were exhibited here. The Court's finding conclude that the payments were insufficiently controlled by the debtor and the payments imparted no property interest to the debtor. See *Grubb v. General Contract Purchase Corporation*, 94 F.2d 70, 72 (2nd Cir.1938) ("Even though the judge had not so found, we should therefore have had no doubt that the proceeds of the bankrupt's note was never part of its assets.") (L.Hand, Judge).

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B. Dimunition of the Estate

As was stated earlier, "the fundamental inquiry under § 547(b) will be whether the Debtor had a legal or equitable interest in the property [transferred] such that the transfer at issue diminished or depleted the Debtor's estate." *In re Moses,* 256 B.R. at 645 (*quoting in re Ogden,* 243 B.R. at 113). At no time was there a transfer of assets which resulted in a diminution of the estate of the Debtor. "It is the ultimate aim of the preference law in the Bankruptcy Code to insure that all creditors receive an equal distribution from the available assets of the debtor." *In re Perma Pacific Properties,* 983 F.2d 964, 968 (10th Cir.1992).

As has been established by the Court in its previous analysis, the payments of Capital One were not sufficiently an interest of the debtor in property. Consequently, the transfer of the payments posed no effect upon the bankruptcy estate.

However, even if there was control over the funds the Debtors' transfer involved a transfer of "credit" and not assets. As such, the transfer would not and could not have involved property of the bankruptcy estate and logically its transfer could not diminish the estate.

"To be preferential a transfer must diminish the funds to which other creditors can legally resort for the payment of their debts." *In re Southmark* 49 F.3d 1111,1117 (5th Cir.1995). "The most important purpose of section 547(b) is to facilitate equal distribution of the

debtor's assets among the creditors. H.R.Rep. No. 595, 95th Cong., 1st Sess. 177-78, *reprinted in* 1978 U.S.Code Cong. & Admin.News 5963, 6138. (Emphasis added). "Of course, if the debtor transfers property that would not have been available for distribution to his creditors in a bankruptcy proceeding, the policy behind the avoidance power is not implicated. The reach of § 547(b)'s avoidance power is therefore limited to transfers of "property of the debtor." " *Begier*, 496 U.S. at 58.

At no time was there a transfer of assets which resulted in a diminution of the estate of the Debtor. The cash value of the estate was not effected by the transfer. As the bankruptcy court noted, in liklihood all that substantively occurred was the debtors' line of credit was decreased with Capital One, while equally increasing available credit from MBNA (or its successor in interest).[15] (Doc. p. 7-8, fn.16).

This Court respectfully disagrees with the expansive interpretation of "property of the estate" supported in *In re Anderson, In re Werner,* and discussed in *Matter of Smith.* This Court's position is lent support from the case of, *Loveridge v. The Ark of Little Cottonwood, Inc.* (*In re Perry*), 343 B.R. 685 (Bankr.D.Utah 2005). In *Perry* the sole issue of a disputed 547(b) transfer concerned whether the transfer was for "an interest of the debtor in property." There the debtor made a credit

15. The Bankruptcy Court stated that the materials supplied by the parties did not provide the available credit information for the account to which the $21,000 payment was credited.

card payment of $9,000 through his MBNA credit card to a creditor, Ark of Little Cottonwood. The trustee argued this transfer was a preference transfer.[16] The court distinguished credit from property noting that "[a]t most a debtor's credit constitutes merely potential wealth" and that "[credit] on its own served no immediate benefit to the estate in bankruptcy."

This court respects the judgements of those courts reaching a contrary conclusion, however it cannot stretch the definition of an "interest in property" so far as to include those items which are not assets of the estate nor capable of being designated property. This Court maintains that if such a broad definition of a transfer was the intention of the legislation that Congress would have likely stated as such or may do so in the future.

The court adds that while it is unfortunate that Capital One will likely endure some financial fallout, it undoubtedly had the opportunity to vet its purchase of the debtors' MBNA debt and incidently proceeded at its own risk in the transactions.

Due to the debtor's insufficient control of the payments and the payments bearing no effect upon diminishing the debtor's bankruptcy estate, the judgment of the Bankruptcy Court is AFFIRMED.

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16. All other elements were stipulated to satisfy 547(b).

Appendix B

It is so ORDERED on this *26th* day of February, 2008.

s/ Wesley E. Brown
Senior Federal District Judge
The Honorable Wesley E. Brown

APPENDIX C — MEMORANDUM AND ORDER DENYING TRUSTEE'S COMPLAINT TO RECOVER PREFERENCE FROM DEFENDANT FIA CARD SERVICES OF THE UNITED STATES BAKRUPTCY COURT FOR THE DISTRICT OF KANSAS FILED JULY 23, 2007

IN THE UNITED STATES BAKRUPTCY COURT FOR THE DISTRICT OF KANSAS

CASE NO. 05-18216
CHAPTER 7

ADV. NO. 06-5181

In re:

BRYAN K. MARSHALL and JULIE M. MARSHALL,

DEBTORS.

LINDA S. PARKS, Trustee,

PLAINTIFF,

v.

FIA CARD SERVICES, N.A., successor in interest to MBNA CORPORATION,

DEFENDANTS.

Appendix C

MEMORANDUM AND ORDER DENYING TRUSTEE'S COMPLAINT TO RECOVER PREFERENCE FROM DEFENDANT FIA CARD SERVICES

The matter under advisement is the Chapter 7 Trustee's Complaint to Recover Preference[1] pursuant to 11 U.S.C. § 547(b).[2] The plaintiff Chapter 7 Trustee, Linda S. Parks (hereafter "Trustee"), appears by Jennifer L. Goheen-Lynch of Hite, Fanning & Honeyman, L.L.P. The defendant FIA Card Services, N.A. (hereafter "FIA" or "Creditor") appears by Elizabeth A. Carson of Bruce, Bruce & Lehman, L.L.C. FIA is the successor to MBNA Corporation, doing

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1. The Trustee's complaint, filed on March 31, 2006, alleges preferential transfers were received by defendants MBNA Corporation and GE Money Bank/Monogram Credit Bank of Georgia. Doc. 1. On September 11, 2006 the Court entered a Journal Entry of Dismissal of Adversary Action Against GE Money Bank/Monogram Credit Card Bank of Georgia, d/b/a/ Lowe's Credit Card, stating that the Complaint had been settled as to this defendant and dismissing that portion of the Complaint with prejudice. Doc. 24.

2. This case was filed on October 13, 2005, before October 17, 2005, when most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 become effective. All statutory references to the Bankruptcy Code are to 11 U.S.C. §§ 101-1330 (2004), unless otherwise specified. All references to the Federal Rules of Bankruptcy Procedure are to Fed. R. Bankr.P. (2004), unless otherwise specified.

business as MBNA America (hereafter "MBNA"). There are no other appearances. The Court has jurisdiction.[3]

In this action, the Trustee seeks to recover payments credited to the Debtors' two credit card accounts with MBNA made at Debtors' request by transferring the balances on the MBNA accounts to Debtors' Capital One Platinum Visa Accounts. The dispute is whether the transactions constitute transfers of "an interest of the debtor in property" within the meaning of § 547(b). The Trustee characterizes the payments as the transfer of borrowed funds, which are transfers for preference purposes. The Debtors, on the other hand, contend that the transfers were not preferential because they were from bank to bank and did not diminish the estate. For the reasons stated below, the Court holds that the transfers were not preferential.

FINDINGS OF FACT.

The parties submitted this dispute for resolution based upon a detailed joint stipulation of facts and

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3. This Court has jurisdiction pursuant to 28 U.S.C. § 157(a) and §§ 1334(a) and (b) and the Standing Order of the United States District Court for the District of Kansas that exercised authority conferred by § 157(a) to refer to the District's Bankruptcy judges all matters under the Bankruptcy Code and all proceedings arising under the Code or arising in or related to a case under the Code, effective July 10, 1984. A complaint to recover a preference is a core proceeding which this Court may hear and determine as provided in 28 U.S.C. § 157(b)(2)(F). There is no objection to venue or jurisdiction over the parties.

briefs. Based upon the stipulation, the Court finds that the facts are as follows.

Debtors had two credit card accounts with MBNA, one account ending in 6264 and one account ending in 7781. On July 24, 2005 the balance on the MBNA account ending in 6264 was $17,009.55, and the balance on the MBNA account ending in 7781 was $22,449.15. Debtors also had two Capital One Platinum Mastercard Accounts, with $30,000 available credit on the account ending in 0125 and $25,000 available credit on the account ending in 5090[4].

On July 27, 2005, in accord with Debtors' directions, Capital One paid MBNA the sum of $17,000 on the MBNA account ending in 6264 and the sum of $21,000 on the MBNA account ending in 7781. Debtors' credit limit on the MBNA account ending in 6264 was increased by the amount of the payment.[5] The amounts due by Debtors to Capital One Platinum MasterCard Accounts were increased by the amounts of the payments to

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4. *See* Stipulations, Exh. nos. D and E.

5. *See* Stipulations, Exh. nos. A and B. For the MBNA account ending in 6264 cash or credit available increased from $1,790.45 on the July statement to $19,752.45 on the August statement, after the $17,000 transfer from MBNA. The facts do not include information about the credit available after the payment for MBNA account ending in 7781. See Stipulations, Exh. no. C. (statements for the MBNA account ending in 7781 that are in a format different from those for the account ending in 6264, and the credit balance is not shown.)

MBNA, with the transfer of $17,000 being charged to the Capital account ending in 0125 and $21,000 being charged to the account ending in 5090. No funds were disbursed to the Debtors. Debtors' total credit card debt was not increased by the transactions.

In the past, Debtors had made sporadic, monthly payments to MBNA, in amounts significantly less that the full account balances. The July 27, 2005 payments were made within the preference period, while the Debtors were insolvent.

ANALYSIS AND CONCLUSIONS OF LAW.

"Equality of distribution among creditors is a central policy of the Bankruptcy Code."[6] Section 547, which allows the trustee to avoid preferential transfers, furthers this policy.[7] As stated by the Tenth Circuit, § 547 has a "dual purpose: it prevents individual creditors from dismembering the assets of the debtor in a manner that negatively impacts other creditors, and it allows all creditors to obtain a more equitable distribution of the assets of the debtor."[8] Under § 547(b), "a transfer is avoidable if it: (1) is of an interest of the debtor in

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6. *Begier v. I.R.S.*, 496 U.S. 53, 58, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990).

7. *Id.*

8. *Bailey v. Big Sky Motors, Ltd. (In re Ogden)*, 314 F.3d 1190, 1196 (10th Cir.2002).

property; (2) is for the benefit of a creditor; (3) is made for or on account of antecedent debt owed by the debtor before the transfer was made; (4) is made while the debtor was insolvent; (5) is made on or within ninety days before the date the bankruptcy petition was filed; and (6) allows a creditor to receive more than the creditor would otherwise be entitled to receive from the bankruptcy estate."[9] In this case, as to the payments to MBNA, the parties agree that all elements except the first are satisfied. MBNA challenges only the Trustee's assertion that the payments were of "an interest of the debtor in property."

The Code does not define "an interest of the debtor in property." "Because the purpose of the avoidance provision is to preserve the property includable within the bankruptcy estate—the property available for distribution to creditors—'property of the debtor' subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings."[10] Section "547(b)'s 'property of the debtor' is 'coextensive with interest of the debtor in property as that term is used in 11 U.S.C. § 541(a)(1).' "[11] Section 541(a)(1) defines the

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9. *Id.*

10. *Begier v. I.R.S.*, 496 U.S. at 58, 110 S.Ct. 2258.

11. *In re Ogden*, 314 F.3d at 1197, *citing Begier v. I.R.S.*, 496 U.S. at 59 n. 3, 110 S.Ct. 2258.

property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." For purposes of the preference statute, "[p]roperty interests are created and defined by state law."[12] "[T]he fundamental inquiry under § 547(b) will be whether the Debtor had a legal or equitable interest in the property [transferred] such that the transfer at issue diminished or depleted the Debtor's estate."[13] In preference litigation, the form of the transaction must satisfy the statutory elements, and the "debtor's intent or motive is not material."[14]

In this case, the Trustee contends that the Debtors transferred money to MBNA in payment of the majority of the outstanding balances of their two credit card accounts and the money transferred was an interest of the Debtors in property. Debtors respond that Capital One, not the Debtors, transferred cash to MBNA. According to Debtors, there was no preferential transfer because all that happened was a substitution of one creditor for another, which did not result in a diminution of the assets of the estate.

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12. *Id., citing Butner v. U.S.*, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979).

13. *Manchester v. First Bank & Trust Co. (In re Moses)*, 256 B.R. 641, 645 (10th Cir. BAP 2000), *quoting Bailey v. Hazen (In re Ogden)*, 243 B.R. 104, 113 (10th Cir. BAP 2000).

14. 5 *Collier on Bankruptcy* ¶ 547.03 (Alan N. Resnick & Henry J. Sommer eds.—in-chief, 15th ed. rev.2007).

These conflicting positions require the Court to determine the nature of the transactions. Before the payments by Capitol One, the Debtors had available pursuant to their agreements with Capitol One two substantial lines of credit. On July 28, 2005, Debtors accepted Capitol One's offer of credit; pursuant to Debtors' request, Capitol One transferred funds to MBNA and posted balances due from Debtors to Capital One in the amounts paid to MBNA. There was a substitution of creditors. Before the transactions Debtors owed MBNA; after the transactions, Debtors' obligation to MBNA was reduced by $28,000 and their liability to Capitol One increased by a like amount.[15] At least as to the MBNA account ending in 6264, there was a reciprocal change in the lines of credit available from MBNA and Capitol One account ending in 0125.

Did these transactions constitute a transfer of an interest of the Debtors in property, as required for preferential transfers? The Court finds they did not. Capitol One, not the Debtors, paid MBNA. The Debtors did not transfer an interest in property to MBNA. The Debtors exercised a right to draw on a line of credit offered by Capital One.[16] Credit is not an interest

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15. It appears that Debtors were not charged a transfer fee by Capitol One.

16. In addition, it is likely that the transactions did not reduce the total credit available to Debtors. As to the $17,000 payment, the decease in credit available through Capitol One was offset by the increase in the line of credit available from (Cont'd)

available for satisfaction of creditors' claims in bankruptcy. Neither Debtors' assets nor their liabilities changed.

The finding that there was not a transfer of an interest in property is in harmony with the policy of § 547. The recovery of interests in property of the debtor transferred shortly before filing serves the purposes of protecting against dismemberment of the debtor's assets and promoting equality of distribution to creditors. Transfers that deplete or diminish the debtor's estate are recovered for the benefit of the estate. "Of course, if the debtor transfers property that would not have been available for distribution to his creditors in a bankruptcy proceeding, the policy behind the avoidance power is not implicated."[17] Here the Debtor's drawing on their line of credit did not diminish the property available to their creditors. A debtor's pre-petition right to receive an extension of credit is not a right which can be utilized for the benefit of creditors of the estate.[18]

(Cont'd)

MBNA. The materials supplied by the parties do not provide the available credit information for the account to which the $21,000 payment was credited.

17. *Begier v. I.R.S.*, 496 U.S. at 58, 110 S.Ct. 2258.

18. *See* 11 U.S.C. § 365(c)(2) (the trustee may not assume a contract to make a loan or extend other debt financing or financial accommodation). Post-petition extensions of credit are governed by § 364.

Appendix C

This Court's analysis is similar to that of Judge Thurman in *In re Perry.*[19] Debtor filed for relief 62 days after he directed MBNA, his credit card company, to make a $7,000 payment to Ark, a creditor. The transfer of funds was between the card issuer and the creditor; resulting in a decrease of the debtor's available credit. The trustee filed a preference action to recover the $7,000 payment. On motion of the creditor, the court dismissed the complaint. The court reasoned that "[a]t most a debtor's credit constitutes merely potential wealth" which "on its own serves no immediate benefit to the estate in bankruptcy."[20] Creditors cannot force a debtor to use credit to provide assets for distribution. The court concluded:

> Despite the broad scope of § 541, the payment at issue was not a transfer of property of the estate. The payment constituted merely a transfer from MBNA to Ark. Debtor's estate was only implicated by this transfer insofar as MBNA decreased the credit allowance under Debtor's credit card account. Since the payment was a transfer of mere credit, and did not affect the amount of liquidity or property available for distribution by the estate's creditors, the payment was not a

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19. *Loveridge v. The Ark of Little Cottonwood, Inc. (In re Perry)*, 343 B.R. 685 (Bankr.D.Utah 2005).

20. *Id.*, 343 B.R. at 688.

transfer of an interest of the debtor in property.[21]

This Court's analysis, as well as that of Judge Thurman, appear to represent a minority view. The Trustee relies on several decisions finding a preferential transfer under similar circumstances.[22] For the reasons stated below, this Court declines to follow those authorities.

The cases cited by the Trustee include *In re Moses*, a Tenth Circuit BAP decision. In that case, the Chapter 7 trustee brought a reference action to recover a payment which debtor had made to a bank with proceeds of a loan obtained from his employee benefit plan. Although the debtor informed the employee benefit plan that he intended to use the loan proceeds in part to pay off his bank loan, the loan proceeds were paid directly

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21. *Id.*

22. Trustee relies primarily upon *Yoppolo v. Greenwood Trust Co. (In re Spitler)*, 213 B.R. 995 (Bankr.N.D.Ohio 1997); and *Lewis v. Providian Bancorp (In re Getman)*, 218 B.R. 490 (Bankr.W.D.Mo.1998). Trustee also cites *Growe v. AT & T Universal Card Services (In re Adams)*, 240 B.R. 807 (Bankr.D.Me.1999); *Rafool v. Citizens Equity Fed. Credit Union (In re Hurt)*, 202 B.R. 611 (Bankr.C.D.Ill.1996); and *Reisz v. Napus Fed. Credit Union (In re Anderson)*, 275 B.R. 264 (Bankr.W.D.Ky.2002). In each of these three cases, the courts rejected the earmarking doctrine as a defense to a preference action where the debtors used credit provided by one credit card company to pay off another credit card debt.

to debtor by check. On the same day he filed for bankruptcy, debtor used a portion of the loan proceeds to satisfy his debt with the bank. In defense of the preference action, the bank contended that the transfer was not of an interest in property of the debtor because the proceeds of the loan from the trust were "earmarked" for payment to the bank. The bankruptcy court granted the trustee's motion for summary judgment, and the BAP affirmed. The BAP described the earmarking doctrine as follows:

> "Earmarking" is a judicially-created doctrine said to apply when a new creditor pays a debtor's existing debt to an old creditor. This doctrine originally arose under the Bankruptcy Act in codebtor cases—the new creditor, who was obligated on an existing debt as a guarantor or surety, provided the debtor with funds to pay the old creditor. . . . In such cases, courts reasoned that the codebtor's payment to the old creditor did not constitute a transfer of the debtor's property, and there was no diminution of the debtor's estate inasmuch as the amount available for unsecured creditors remained the same as before the transfer regardless of the debtor's control of the transferred funds. . . .[23]
>
> The earmarking doctrine was eventually extended "to situations where the new

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23. *In re Moses*, 256 B.R. at 645-46 (citations omitted).

> creditor is not a guarantor but merely loans funds to the debtor for the purpose of enabling the debtor to pay the old creditor." This extension of the doctrine has been subject to attack.[24]

The BAP went on the reject the earmarking doctrine in other than co-debtor cases, finding it unjustly preferred the old creditor, undermined the goals of § 547, and was not a defense provided by § 547(c). The court therefore held that the earmarking doctrine "does not replace the 'transfer of an interest of the debtor in property' element of § 547(b)."[25] As to the circumstances before it, the court concluded that the transfer was of an interest of the debtor in property. The transfer diminished the debtor's estate because the loan proceeds that were paid to the debtor would have been available to the pool of creditors if they were not paid to one creditor, the bank.[26] While the debtor's liabilities did not change, his assets did.

In accord with *Moses,* the Debtors do not rely upon and this Court has not invoked the earmarking doctrine. The Trustee's complaint has been analyzed using the "interest of the debtor in property" element of § 547(a).

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24. *Id.*, 256 B.R. at 646, *quoting McCuskey v. Nat'l Bank (In re Bohlen Enters., Ltd.)*, 859 F.2d 561, 566 (8th Cir.1988).

25. *Id.*, 256 B.R. at 645.

26. *Id.*, 256 B.R. at 649.

That analysis leads to a result different from *Moses* because in this case, in contrast to *Moses*, the proceeds of the new loan were never in the possession of the Debtors and were not assets which would have been available to other creditors if not forwarded to MBNA.

The primary case upon which the Trustee relies is *Spitler*.[27] In May 1996, debtors transferred their debt balances on two credit cards to a new credit card offered by defendant Greenwood. In July and August, 1996, debtors made two cash payments on the Greenwood credit card debt. In September, debtors made a $9,950.10 payment to Greenwood by writing a convenience check on another credit card account offered by First Union. The debtors thereby consolidated three accounts to First Union. Debtors filed for relief less than 90 days after the September payment. The trustee filed a preference action to recover the September payment from Greenwood. In defense, Greenwood first argued that the debtors never possessed legal title to the funds, never exercised dominion or control over the funds, and only exercised a contractual right to use the line of credit. As a second argument, Greenwood relied upon the earmarking doctrine. The court denied Greenwood's motion for summary judgment. It addressed the first and second arguments together, finding the case law under earmarking doctrine as stated by the Eighth Circuit in

27. *In re Spitler*, 213 B.R. at 995.

Bohlen[28] and the Sixth Circuit in *Montgomery*[29] persuasive and controlling. Under these authorities, the determinative issue was whether the debtor exercised dominion and control over the loan proceeds. Turning to the facts of the trustee's complaint, the court found that debtors had dominion and control over the use of the credit proceeds and could have used them to pay any number of creditors or simply kept the money for themselves.[30]

The Trustee also relies upon *Getman,*[31] a case from the Western District of Missouri, where the *Bohlen* decision relied upon in *Spitler* is controlling precedent. In *Getman,* as in this case, at debtor's request, an account balance was transferred from a pre-existing creditor (First Deposit) to new credit card account at Bank of America by direct payment to the creditor First Deposit. When defending a preference action, the First Deposit's successor Providian relied upon the earmarking doctrine. The court granted the trustee's motion for summary judgment. It noted that the Eighth Circuit in *Bohlen* limited the earmarking doctrine to "cases where the new creditor has control over

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28. *McCuskey v. Nat'l Bank (In re Bohlen Enters., Ltd.),* 859 F.2d 561 (8th Cir.1988).

29. *McLemore v. Third Nat'l Bank In Nashville (In re Montgomery),* 983 F.2d 1389 (6th Cir.1993).

30. *In re Spitler,* 213 B.R. at 998.

31. *In re Getman,* 218 B.R. at 490.

disposition"[32] of the loan proceeds. In *Getman* the court held earmarking did not provide a defense to the creditor because the debtor alone designated the creditor for payment. The court reasoned that debtor could have used the loan proceeds to pay any creditor or to purchase assets which might have been available for his creditors. Based upon the inapplicability of earmarking, the court concluded "[w]hen debtor drew down such funds by designating them for payment to Providian, he had a property interest in such funds."[33]

This Court respectfully disagrees with *Spitler* and *Getman*. In the opinion of this Court, the theoretical possibility that a debtor can draw upon a line of credit for any purpose is not sufficient to find the debtor has a property interest in credit proceeds that at debtor's direction are paid directly to a specific creditor. A debtor's line of credit is not an asset available to increase the property available for the payment to creditors. The *Spitler* and *Getman* courts wrongfully focused upon what the debtor could have done rather than what he did do.

CONCLUSION.

For the foregoing reasons, the Court finds that Trustee has not sustained her burden of proof. A transaction will not be set aside as preferential unless

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32. *Id.*, 218 B.R. at 493.

33. *Id.*, 218 B.R. at 494.

the transfer was of an interest of the debtor in property. In this case, the funds paid to defendant MBNA were assets of Capitol One in which the Debtors did not have an interest for purposes of § 547. Debtors merely exercised an offer to transfer credit card balances; this offer, if not exercised as of the date of filing, would have added no value to the estate. The transfer was a mere substitution of creditors which had no impact on either the property of the estate or the value of the claims asserted against the estate. The Complaint is denied.

The foregoing constitute Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based upon this ruling will be entered on a separate document as required by Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58.

IT IS SO ORDERED.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING FILED JANUARY 27, 2009

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 08-3080

In re: BRYAN K. MARSHALL, et al.,

Debtors.

LINDA S. PARKS, Trustee,

Plaintiff - Appellant,

v.

FIA CARD SERVICES, N.A.,
Successor in interest to MBNA CORPORATION,

Defendant - Appellee.

ORDER

Before **TACHA**, **BRISCOW**, **and O'BRIEN**, Circuit Judges.

Appellee's petition for rehearing is denied.

Appendix D

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk